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Supreme Court, U.S.
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In The
Supreme Court of the United States

MOHAMMAD MUNAF, ET AL.,

Petitioners,

v.

PETE GEREN, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

JONATHAN HAFETZ
AZIZ Z. HUQ
BRENNAN CENTER FOR JUSTICE
NEW YORK UNIVERSITY SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
Telephone: (212) 998-6730

SUSAN L. BURKE
KATHERINE HAWKINS
BURKE O'NEIL, LLC
4112 Station Street
Philadelphia, PA 19127
Telephone: (215) 487-6590

JOSEPH MARGULIES
Counsel of Record
MACARTHUR JUSTICE CENTER
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
357 East Chicago Avenue
Chicago, IL 60611
Telephone: (312) 503-0890

ERIC M. FREEDMAN
250 West 94th Street
New York, NY 10025
Telephone: (212) 665-2713

VINCENT MOCCIO
AMY MAGID
ROBINS, KAPLAN, MILLER & CIRESI
2800 LaSalle Plaza
Minneapolis, MN 55402
Telephone: (612) 349-8500

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. When an American citizen is detained under the exclusive control of American military authorities abroad, is the jurisdiction of a federal court to entertain his petition for a writ of habeas corpus defeated by the fact that those American military authorities purport to act as a part of a multi-national force and that they propose – with no valid legal authority – to deliver the citizen to a foreign nation for execution of a death sentence imposed by a court of that nation?

2. Does the decision of the Court of Appeals, holding that *Hirota v. MacArthur* deprives the federal courts of jurisdiction under these circumstances, extend the 1948 *per curiam* opinion in *Hirota* into conflict with this Court's post-1948 jurisprudence culminating in *Rasul v. Bush* and *Hamdi v. Rumsfeld*, and should that conflict be resolved either by restricting *Hirota* to its proper sphere or by overruling it?

3. Did the Court of Appeals err in holding that the jurisdiction of the federal courts over a habeas corpus petition filed by an American citizen detained under the exclusive control of American military authorities abroad turns on whether those authorities propose to deliver him to a foreign nation for prosecution in its courts (in which case the Court of Appeals has held that habeas jurisdiction exists) or for execution of sentence after conviction by the foreign court (in which case the Court of Appeals here holds that jurisdiction ceases to exist)? If this distinction is valid, can the military authorities defeat federal habeas corpus jurisdiction *ex post* by doing what they did in this case – arranging the conviction and sentencing of their detainee by a foreign court *after* his habeas petition has been filed?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

Mohammad Munaf, who is imprisoned at Camp Cropper, in Iraq, appeared below as the petitioner, with his sister, Maisoon Mohammed, acting as his next friend. The following people appeared below as respondents: Pete Geren, the Secretary of the Army; Major General John D. Gardner, Deputy Commanding General of Detainee Operations; and Lieutenant Colonel Quentin K. Crank, petitioner's immediate custodian.

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PETITION FOR A WRIT OF CERTIORARI

Mohammad Munaf, with his sister Maisoon Mohammed as next friend, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Munaf v. Geren*, 482 F.3d 582 (D.C. Cir. 2007), and is reprinted at Appendix A to this petition. The opinion of the United States District Court for the District of Columbia is reported as *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006), and is reprinted as Appendix B.

JURISDICTION

The Court of Appeals entered its judgment April 6, 2007, and, on May 9, granted Mr. Munaf's motion to stay the mandate pending the disposition of this petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fifth Amendment to the United States Constitution, which provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

This case also involves the Suspension Clause to the Constitution, which provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

This case also involves 28 U.S.C. § 2241, which provides in relevant part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.
>
> * * *
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless –
>
> 1. He is in custody under or by color of the authority of the United States . . . ; or
>
> * * *
>
> 3. He is in custody in violation of the Constitution or laws or treaties of the United States. . . .

STATEMENT

This petition arises from a divided decision of the Court of Appeals for the District of Columbia Circuit dismissing the habeas corpus petition of a U.S. citizen in U.S. military custody overseas. The lower court relied on a 59-year-old *per curiam* opinion from this Court that it described as not "especially clear or compelling, particularly as applied to American citizens," a decision whose

continuing vitality has been called into question by more recent rulings here. But the Court of Appeals expressly concluded it would leave to this Court "the prerogative of overruling its own decisions." *Munaf v. Geren*, 482 F.3d 582, 585 (D.C. Cir. 2007) (App. A at 6).

A. Statement of Facts

Mohammad Munaf was born in Baghdad, Iraq, and emigrated to the United States in 1990 with his wife. J.A. 7.[1] In 2000, after ten years in the United States, Mr. Munaf naturalized to become an American citizen. *Id.* at 11. Mr. Munaf and his wife have three young children, all U.S. citizens. *Id.* at 12.

Mr. Munaf's wife is Romanian, and in 2001 he and his family moved to Bucharest. *Id.* In March 2005, three Romanian journalists invited Mr. Munaf to travel with them to Iraq as their paid translator and guide. *Id.* The four arrived in Iraq in mid-March 2005. In late March, they were kidnapped by an Iraqi group identifying itself as the "Muadh Ibn Jabal Brigade." On May 22, 2005, after nearly two months in captivity, Mr. Munaf and the three journalists were released. *Id.* Upon release, they were taken to the Romanian Embassy in Baghdad.

Immediately thereafter, U.S. military officers arrested Mr. Munaf. *Id.* They moved him to Camp Cropper, a U.S. prison near Baghdad International Airport, where he remains in the custody of U.S. personnel. *Id.* at 8; *Munaf*,

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[1] "J.A." refers to the Joint Appendix filed in the Court of Appeals.

App. A. at 7 (Randolph, J., concurring in the judgment) ("[Munaf] is held by American forces overseas.").[2]

Mr. Munaf's custodians, like all U.S. soldiers in Iraq, answer *only* to a U.S. chain of command and are solely "subject to the authority, direction and control of the Commander, U.S. Central Command[.]" *Advance Questions for General George W. Casey, Jr., U.S. Army Nominee for Commander, Multi-National Force-Iraq*, 108th Cong. 3 (2004).[3] As the government has properly conceded, U.S. citizens imprisoned in Iraq are entirely "in the authority and control of the United States." Arg. Tr., *Omar v. Harvey*, No. 06-5126 (D.C. Cir. Sep. 11, 2006).

B. Proceedings Below

On August 18, 2006 – after almost fifteen months in U.S. custody – Mr. Munaf petitioned for a writ of habeas

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[2] In the lower courts, the government described a non-judicial proceeding that it claims took place at Camp Cropper, and that supposedly led to Mr. Munaf's classification as a "security internee." Brief for the Appellees at 5-6, *Munaf v. Harvey*, 482 F.3d 582 (D.C. Cir. 2006) (No. 06-5324). It is undisputed that Mr. Munaf did not have the benefit of counsel at this proceeding, and the government pointedly does not suggest it satisfied the requirements of the Due Process Clause. When the litigation in this case moves to the merits, the district court may take the measure of this proceeding against the requirements imposed by the Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion) (military must demonstrate lawfulness of citizen's detention by judicial proceeding that satisfies Due Process Clause).

[3] General Casey's Senate testimony was to the same effect. *See Nomination of General George W. Casey, Jr., USA, for Reappointment to the Grade of General and to be Commander, Multi-National Force-Iraq: Hearing Before the S. Comm. On Armed Svcs.*, 108th Cong. (June 24, 2004) (U.S. soldiers in MNF-I do not answer to any component of the United Nations or to any entity other than the United States).

corpus in the United States District Court for the District of Columbia. Through his sister as next friend, he alleged that he had committed no crime or violent act against the U.S. or its allies; that he had not supported forces hostile to American interests; that he had not been a member of or associated with al-Qaeda or any insurgent or militia group; and that his detention by the Executive without lawful process violated, *inter alia*, the Suspension Clause and the Due Process Clause of the Fifth Amendment to the U.S. Constitution. J.A. 7, 13, 85-86. Mr. Munaf invoked the court's jurisdiction pursuant to 28 U.S.C. §§ 2241(a), (c)(1), and (c)(3), as well as the Suspension and Due Process Clauses. *Id.* at 9.

Three weeks after Mr. Munaf began this litigation, counsel for the government advised Mr. Munaf's counsel that Mr. Munaf would be tried for an unspecified civilian crime by an Iraqi court and would be transferred to Iraqi custody if convicted. Because Mr. Munaf, a Sunni Muslim, faces a real and substantial risk of torture if he were delivered to the Iraqi Government, his counsel moved for a temporary restraining order ("TRO") to freeze the *status quo* and prevent any transfer pending the adjudication of his habeas petition. Pet'rs' Mot. for TRO, *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006) (No. 06-1455). The government opposed the motion, contending the District Court lacked jurisdiction over Mr. Munaf's habeas petition. *Id.*, Resp'ts' Mem. in Opp. to Mot. for TRO, *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006) (No. 06-1455).

On October 12, 2006, despite the application for a TRO pending in the District Court, U.S. military officers presented Mr. Munaf before the Central Criminal Court of Iraq ("CCCI") to face criminal charges related to his alleged role in the kidnapping of his three Romanian

companions. *Id.*, Resp. to Pet'rs' Supp. Mot. for TRO at 1, *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006) (No. 06-1455).

Iraqi law requires that an aggrieved party issue a formal complaint against the accused before a prosecution can go forward. J.A. 53. Because Mr. Munaf was charged with kidnapping Romanian citizens, the CCCI could not begin a prosecution without a formal complaint from the Romanian government. *Id.* At the October 12 proceeding, Lieutenant Robert M. Pirone of the U.S. Coast Guard appeared in the CCCI, purportedly on behalf of the Romanian Government, to make a formal complaint against Mr. Munaf. Lieutenant Pirone stated that the Romanian Embassy had authorized him to appear on its behalf. *Id.* at 52. He claimed this authorization was documented in a letter submitted in advance to the Iraqi court. *Id.* No such letter was produced, however. Nor is it part of the public record in either the U.S. or Iraqi courts. *Id.* at 48. Neither Mr. Munaf nor his counsel has seen it. The Government of Romania, meanwhile, has officially and emphatically denied that it authorized Lt. Pirone to speak on its behalf. *Id.* at 85; *see also* U.N. HRC, Communication No. 1539/2006, *Munaf v. Romania* (CCPR), Submissions of Romanian Gov't on Admissibility, ¶21 (Mar. 5, 2007) ("Romanian representatives from the Embassy in Iraq had no knowledge either of the trial, nor of the alleged authorization allegedly given by the Romanian authorities to U.S. officer Robert Pirone.").[4]

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[4] Mr. Munaf has filed a complaint against the Government of Romania in the Inter-American Commission on Human Rights, alleging, *inter alia*, that Romania did not take actions within its power to protect Mr. Munaf from a death sentence. In its response, Romania has insisted Lt. Pirone had no authority to act for the Romanian

(Continued on following page)

After Lt. Pirone set forth what he claimed was Romania's position, he met *ex parte* with the presiding Iraqi judge for approximately fifteen minutes. Immediately thereafter, that judge convicted and sentenced Mr. Munaf to die. J.A. at 49. Mr. Munaf's appeal of his criminal conviction to the Iraqi Court of Cassation is still pending.

Mr. Munaf promptly notified the District Court that he had been convicted and sentenced to death. Pet'rs' Supp. Mot. for TRO, *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006) (No. 06-1455). Nonetheless, on October 19, 2006, the District Court dismissed the case for want of subject matter jurisdiction and denied the TRO application as moot. *Munaf v. Harvey,* 456 F. Supp. 2d 115 (D.D.C. 2006) (App. B).

Mr. Munaf filed an immediate notice of appeal to the D.C. Circuit and asked the Court of Appeals to enjoin the government from transferring him to Iraqi custody pending the outcome of this litigation. On October 27, 2006, a divided motions panel denied the request over a written dissent, but granted an administrative injunction until November 6, conditioned upon Mr. Munaf seeking emergency relief in this Court by that date. *See Munaf v. Harvey,* No. 06-5324, Order (D.C. Cir. Oct. 27, 2006); *id.* (Tatel, J., dissenting). On November 6, petitioner filed simultaneous applications for injunctive relief here and with the *en banc* court of appeals.

Government in the Iraqi proceedings. The documents are available at http://www.brennancenter.org/dynamic/subpages/download_file_49032.pdf and http://www.brennancenter.org/dynamic/subpages/download_file_49034.pdf.

On November 10, 2006, the motions panel issued a *sua sponte* order extending its administrative injunction pending action by the *en banc* court. This removed any imminent risk to Mr. Munaf. Having been so informed, this Court on the next business day denied the motion which was still pending before it. *See Munaf v. Harvey*, No. 06-5324, Order (D.C. Cir. Nov. 10, 2006); *Munaf v. Harvey*, No. 06-A471, Order, 2006 WL 3262398 (U.S. Nov. 13, 2006). On December 15, the *en banc* court granted an injunction barring Mr. Munaf's transfer to Iraqi custody pending resolution of his appeal.

On April 6, 2007, a divided panel affirmed the dismissal of Mr. Munaf's habeas petition, concluding, reluctantly, that its hands were tied by this Court's terse *per curiam* opinion in *Hirota v. MacArthur*, 338 U.S. 197 (1948) (per curiam). *Munaf*, App. A at 5-6. Speaking for the panel majority, Judge Sentelle voiced dissatisfaction with "the logic of *Hirota*," "particularly as applied to U.S. citizens," and "acknowledged" that this Court's recent decisions in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Rasul v. Bush*, 542 U.S. 466 (2004), cast doubt on "*Hirota*'s continuing vitality." *Munaf*, App. A at 5-6. Nonetheless, the majority concluded that clarity on this issue must await action by this Court, which alone enjoys "the prerogative of overruling its own decisions." *Id.* at 6 (quoting *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989)).

Concurring in the judgment, Judge Randolph rejected the government's jurisdictional argument out of hand. He agreed with Mr. Munaf that citizenship and detention by U.S. forces were "critical" distinctions between this case and *Hirota*. *Munaf*, App. A at 7 (Randolph, J. concurring in the judgment); *see also id.* at 8 (extending *Hirota* to bar

habeas petitions filed by or on behalf of U.S. citizens "would contradict . . . the majority and dissenting opinions in *Rasul*"). Judge Randolph, however, would have denied relief on the merits based on grounds neither party had briefed in the courts below. *Id.* at 7-9.

On April 26, 2007, Mr. Munaf moved the Court of Appeals to stay issuance of its mandate pending the filing and ultimate disposition of this petition. The government opposed the motion on the basis that the petition was unlikely to be granted. On May 9, the court below granted Mr. Munaf's motion. The effect of that order is to preserve the Court of Appeals' interim injunction of December 15, 2006, preventing Mr. Munaf's transfer to Iraqi custody. *Munaf v. Geren*, No. 06-5324, Order (D.C. Cir. May 9, 2007).

REASON FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THE WRIT BECAUSE THE LOWER COURT IMPROPERLY EXTENDED *HIROTA v. MACARTHUR* TO A U.S. CITIZEN IMPRISONED BY U.S. SOLDIERS AT A U.S. MILITARY PRISON.

A. Introduction

The significance of this case can hardly be gainsaid. The Executive Branch argues, and the lower court held, that although Congress has not suspended the Great Writ of Habeas Corpus for U.S. citizens, the United States military may nonetheless detain an American citizen in an overseas American prison indefinitely, or dispatch him to his death at the hands of another sovereign, with no

obligation to demonstrate the lawfulness of either his imprisonment or his threatened transfer.

So framed, this case presents questions of surpassing importance: Is the Executive constrained by the Constitution and laws of the United States in its treatment of U.S. citizens detained by U.S. officers at a U.S. prison overseas? And if so, can those citizens enforce those constraints in a federal court by way of habeas corpus? The ruling below, which cast into doubt the long-settled answers to these questions, demands prompt review.

The Court of Appeals held that the Executive need not account for Mr. Munaf's imprisonment or threatened transfer because he has been convicted by an Iraqi court and is being detained "by United States military personnel serving as part of the Multi-National Force-Iraq." *Munaf*, App. A at 2. The lower court did not elaborate on the relative significance of these two facts except to conclude that they brought his case within *Hirota v. MacArthur*, 338 U.S. 197 (1948) (*per curiam*). *Id.* In *Hirota*, the Court declined to entertain a collateral challenge brought by the former Japanese prime minister to his conviction by an international war crimes tribunal. *Hirota* was a nine sentence *per curiam* by a divided and incomplete Court.[5] It was issued three days after oral argument, cited no authority, and has *never* been relied on by this Court for any proposition.

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[5] Justice Murphy dissented without writing in *Hirota*; Justice Rutledge reserved his decision but died before announcing his vote; and Justice Jackson did not participate. *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948). Justice Douglas concurred only in the result, believing the district court *would have had* jurisdiction over the case had it begun in a lower court. *Id.* at 203 (Douglas, J., concurring in the result).

The Circuit Court's decision has dangerously destabilized decades of settled precedent. Most importantly, it threatens to transform the legal landscape for U.S. citizens in U.S. custody. Almost sixty years ago, the Solicitor General asked the Court to deny habeas protections to U.S. citizens detained overseas. Unanimously, the Court refused. In the years that followed, the Court has consistently reaffirmed habeas as the preeminent protection of a citizen's physical liberty. The Circuit Court's decision casts this venerable doctrine in doubt.

At the same time, the lower court's proffered justification for its new rule introduces needless uncertainty into other settled areas of the law. According to the lower court, the bare fact of Mr. Munaf's foreign conviction, along with America's participation in the MNF-I, combine by some uncertain alchemy to strip a federal court of its power to examine the lawfulness of a citizen's detention and threatened transfer. But this simply makes no sense. As for the conviction, this Court has long recognized that a prisoner may use habeas to challenge the lawfulness of his threatened transfer to another sovereign, even in the shadow of a foreign conviction. And, as for American participation in the MNF-I, it is axiomatic that an executive agreement cannot authorize what the Constitution forbids. Executive membership in an international military force, therefore, cannot suspend the Great Writ for U.S. citizens.

The lower court went astray by extending *Hirota* to bar Mr. Munaf's habeas petition. Whatever argument may be made to deny the privilege of litigation to an enemy alien who attempts to mount a collateral challenge to his conviction by a foreign tribunal, it simply has no relevance to a direct challenge by a U.S. citizen to his detention and threatened transfer at the hands of his own countrymen.

The Court should grant *certiorari* and reverse the judgment below to prevent a dangerous erosion of the judiciary's power to hear habeas petitions from U.S. citizens detained abroad, and to prevent unnecessary ambiguities from distorting the settled law governing prisoner transfers and executive agreements.

B. Citizenship Has Been "A Head Of Jurisdiction" For Nearly Sixty Years.

In 1950, the Solicitor General asked the Court to hold that prisoners incarcerated overseas – whether citizen or alien – had no right to challenge their detention in habeas. The Court pointedly refused the invitation, drawing a distinction that has endured for nearly six decades. American citizens, the Court explained, enjoy a "status" distinct from "all categories of aliens":

> Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection.

Johnson v. Eisentrager, 339 U.S. 763, 769-70 (1950); *see also* Brief of Petitioner at 14-15, *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (No. 306) (arguing that citizens as well as aliens held overseas should be denied access to courts). Decided two years after *Hirota*, *Eisentrager* conclusively put to rest any argument that U.S. citizens enjoy no greater protection than enemy aliens when they find themselves imprisoned abroad by their government.

The decades since *Eisentrager* have only solidified the Court's commitment to this principle. *See, e.g., Madsen v. Kinsella*, 343 U.S. 341 (1952) (entertaining habeas petition filed by U.S. citizen convicted and sentenced by a U.S.-controlled occupation court sitting in Germany); *Burns v. Wilson*, 346 U.S. 137, 139 (1953) (plurality opinion) (adjudicating habeas petition from U.S. soldiers imprisoned in Japan); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (granting writ to former U.S. soldier who sought habeas while imprisoned in Korea); *McElroy v. Guagliardo*, 361 U.S. 281, 282 (1960) (granting writ to U.S. citizen who sought habeas while held in Morocco).

By 1973, this principle had achieved sufficient clarity that the Court could proclaim the following general rule with confidence: "Where American citizens confined overseas (and thus outside the territory of any district court) have sought relief in habeas corpus . . . , the petitioners' absence from the district does not present a jurisdictional obstacle to the consideration of the claim." *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973) (internal citations omitted). For U.S. citizens held abroad, the only relevant jurisdictional inquiry is whether an *ultimate* custodian is in the territorial jurisdiction of the district court. *Id.*

The most recent links in this unbroken chain are *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). In *Rasul*, eight Justices "explicitly agreed that American citizens held by American officials overseas could invoke habeas jurisdiction." *Munaf*, App. A. 7 (Randolph, J., concurring in the judgment). Writing for five Justices, Justice Stevens pointed out that a U.S. citizen could invoke the habeas statute to challenge his imprisonment at Guantánamo Bay, Cuba. *Rasul*, 542

U.S. at 481. Dissenting on the ground that the writ did not extend to foreign nationals at Guantánamo, Justice Scalia observed for himself and two other Justices "that United States citizens throughout the world may be entitled to habeas corpus rights, [which] is precisely the position that this Court adopted in *Eisentrager*. . . . " *Id.* at 502.

Rasul concerned foreign nationals. *Hamdi*, however, involved an American citizen seized by a multinational force within a theater of active military operations. 542 U.S. at 510 (plurality opinion) (noting that Hamdi was captured in Afghanistan by Afghan, not American, forces).[6] Hamdi was transferred to the physical custody of the U.S. military, and held first in Afghanistan, then at the Guantánamo Bay Naval Base, and ultimately at military brigs in Virginia and South Carolina. *Id.* Like Mr. Munaf, Hamdi filed a habeas petition seeking to vindicate "the most elemental of liberty interests – the interest in being free from physical detention by one's own government." *Id.* at 529. Not one Justice suggested even a possibility that jurisdiction was wanting. *Id.* at 539; *id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 554 (Scalia, J., dissenting); *id.* at 585 (Thomas, J., dissenting).

Like Hamdi, Mr. Munaf is a U.S. citizen taken into U.S. custody in the course of an overseas multinational

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[6] The U.N. Resolutions that authorized multinational operations in Afghanistan mirror the Resolutions that established the multinational force in Iraq. *Compare* U.N. Resolution 1386 ¶ 1 (Dec. 20, 2001) (authorizing an "International Security Assistance Force" to maintain security in Afghanistan) *with* U.N. Resolution 1511 ¶ 13 (Oct. 16, 2003) (authorizing a "multinational force" to maintain security in Iraq); U.N. Resolution 1546 ¶ 10 (June 8, 2004) (authorizing the "multinational force" to take all necessary steps to maintain and stabilize Iraq).

military operation. Like Hamdi, Mr. Munaf was initially seized by an ally of the United States. J.A. 12. And like Hamdi, Mr. Munaf is in the present and actual custody of U.S. officers. *Munaf*, App. A at 2 (Munaf "is being held, in Iraq, by United States military personnel . . . "); *id.* at 7 (Randolph, J., concurring in the judgment) ("[Munaf] is held by American forces overseas.").[7] Quite literally, U.S. military officers hold the key to his cell. They alone have the authority to release him, should a U.S. court order it done. *Braden*, 410 U.S. at 495. Habeas jurisdiction requires nothing more.

This entire jurisprudence – from *Eisentrager* to *Hamdi* – developed *after Hirota*. And the panel majority freely "acknowledged" that the most recent decisions in this line – *Rasul* and *Hamdi* – cast "*Hirota*'s continued vitality" into doubt. *Munaf*, App. A at 6. Indeed, the majority candidly confessed that the logic of *Hirota* was in no way "clear or compelling, particularly as applied to American citizens." Yet because "*Hirota* did not suggest any distinction between citizens and non-citizens," the lower court concluded, reluctantly, that it was bound by the decision, leaving it to this Court to resolve the inconsistencies in the doctrine. *Id.* Judge Randolph, however, disagreed, tersely dismissing reliance on *Hirota*. "To

[7] The fact that Mr. Munaf is being held in Iraq while Hamdi was held in South Carolina does not alter the result. As *Eisentrager* and its progeny make plain, detention overseas does not alter the jurisdictional calculus for American citizens. *See supra* at 11-14. Further, as Justice O'Connor cautioned in *Hamdi*, granting access to U.S. courts for American citizens held within the country but denying it to American citizens held overseas would create a "perverse incentive" for the military to "simply keep citizen-detainees abroad." *Hamdi*, 542 U.S. at 524 (plurality opinion). And, in any event, the location of Mr. Munaf's detention was irrelevant to the lower court's jurisdictional logic.

extend *Hirota* to habeas petitions filed by American citizens," he warned, "would contradict *Eisentrager* and the majority and dissenting opinions in *Rasul*." *Id.* at 8 (Randolph, J., concurring in the judgment).

The net effect of the lower court's decision is to upend almost six decades of settled precedent. The Circuit Court has introduced dangerous uncertainty into the law by holding that a U.S. citizen imprisoned by his government may not challenge his detention in an American court – precisely the result sought by the Solicitor General and denied by the Court in *Eisentrager*. The lower court understood perfectly well that this result dramatically extended *Hirota* and created a conflict with more recent Supreme Court authority. But the Court of Appeals left it to this Court to restore clarity and predictability to the law. The Court should accept the lower court's invitation. It should grant certiorari to reaffirm a bedrock principle of our constitutional democracy: Unless Congress has suspended the writ, a U.S. citizen may always challenge the lawfulness of his detention at the hands of his countrymen.

C. Treating Mr. Munaf's Case As An Exception To The Rule Of Habeas Jurisdiction For Citizens Has Created Dangerous Uncertainty In The Law.

The panel majority believed that Mr. Munaf's conviction by an Iraqi court, combined with the U.S. government's participation in the MNF-I, distinguished his case from *Eisentrager* and its progeny and brought it within *Hirota*. *Munaf*, App. A at 2. But the lower court's struggle to bring Mr. Munaf's case within *Hirota* has produced a rule that simply makes no sense, even as it destabilizes previously settled doctrines.

a. By Making Habeas Jurisdiction Hinge On The Fact Of A Foreign Conviction, The Lower Court Ignored Settled Constitutional Principles And Introduced Needless Ambiguity Into The Law Of Prisoner Transfers.

With respect to American citizens, the habeas statute is unambiguous and unequivocal: The writ may be granted by "the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions," so long as the prisoner "is in custody under or by color of the authority of the United States," or "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(a), (c)(1), (c)(3). In this regard, the statute has been a bulwark of remarkable constancy. Since 1789 when it was passed by Congress in the First Judiciary Act, and through several legislative refinements, Congress has *always* given an American citizen the right to challenge the lawfulness of his detention by the Executive. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82. And nothing in this statute has ever remotely depended on the presence or absence of a foreign conviction.

Equally, the law is unmistakably clear that "in the absence of a conventional or legislative provision, there is no authority vested in any department of the government to seize a fugitive criminal and surrender him to a foreign power." *Valentine v. United States*, 297 U.S. 5, 9 (1936); *see also, e.g., Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933) ("[T]he legal right to demand [a prisoner's] extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty") (collecting cases); *Quinn v. Robinson*, 783 F.2d 776, 782 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986) ("[N]o branch of the

United States government has any authority to surrender an accused to a foreign government except as provided for by statute or treaty"); *Holmes v. Laird*, 459 F.2d 1211, 1219 n.59 (D.C. Cir.) ("It is certainly the law that the power of the Executive Branch to invade one's personal liberty by handing him over to a foreign government for criminal proceedings must be traced to the provisions of an applicable treaty."), *cert. denied*, 409 U.S. 869 (1972).

Because the Executive may not transfer a prisoner to another sovereign "in the absence of a conventional or legislative provision," *Valentine, supra*, federal courts have for centuries relied on habeas to test the lawfulness of a prisoner's threatened transfer. *See generally* M. Cherif Bassiouni, *International Extradition: United States Law and Practice* 70-72 (4th ed. 2002) (citing cases); *see also, e.g.*, *Holmes v. Jennison*, 39 U.S. 540, 561-63 (1840) (granting writ of habeas corpus to prisoner wanted for extradition to Canada). For as long as it has applied this doctrine, the Court has understood that this inquiry may take place under the shadow of a foreign conviction. *See, e.g.*, *Terlinden v. Ames*, 184 U.S. 270 (1902) (defining extradition as "the surrender by one nation to another of an individual accused *or convicted* of an offence . . . ") (emphasis added). Indeed, it is frequently the very fact of the foreign conviction that triggers the demand for the prisoner's surrender. *See, e.g.*, *Holmes*, 459 F.2d at 1212, 1214 (describing Germany's demand for surrender of U.S. citizen convicted of attempted rape). Habeas jurisdiction in these circumstances is abundantly well settled.

The court below nevertheless cast this settled doctrine into disarray by making "the fact of a criminal conviction in a non-U.S. court [] a fact of jurisdictional significance under the habeas statute." *Munaf*, App. A at 6. And the

same court has solidified this rule by taking a complementary (but correct) position in another case. In *Omar v. Harvey*, No. 06-5126, Slip Op. (D.C. Cir. Feb. 9, 2007), another panel of the Court of Appeals held that a U.S. citizen detained in Iraq by American forces could challenge his detention in habeas because he had not been charged or convicted by an Iraqi court. *Id.* at 12-13.[8] As a consequence, the law in the D.C. Circuit reduces to this: U.S. citizens convicted by a foreign court may *not* challenge the lawfulness of their threatened transfer in an American courtroom, but citizens who have not yet been convicted may.

The government and Mr. Munaf agree on one point: this rule is simply irrational. *See* Appellant's Pet. for Reh'g and Reh'g En Banc at 11, *Omar v. Harvey*, No. 06-5126 (D.C. Cir. Mar. 26, 2007) (making jurisdiction turn on fact of a foreign conviction is "contrary to . . . common sense"). Under the rule adopted by the Court of Appeals, the District Court apparently had jurisdiction when Mr. Munaf filed his habeas petition in August 2006, but somehow lost it two months later when he was convicted. *Cf. Grupo Dataflux v. Atlas Global Group,* 541 U.S. 567, 570-71 (2004) (affirming long-standing time-of-filing rule for calculation of federal-court jurisdiction). The power of the federal judiciary, in other words, turns on the timing of a foreign tribunal's decision. This rule is not merely nonsensical – it also creates an intolerable incentive for the Executive to engage in precisely the sort of manipulations of a foreign tribunal that are alleged to have

[8] Mr. Omar and Mr. Munaf are represented by the same counsel.

occurred here. Nothing in the habeas statute supports this result.

Nor will the state of the law improve through additional percolation of the issue: U.S. prisoners have either been convicted by a foreign court or they have not. If they have not, the longstanding rule of *Eisentrager*, confirmed in *Omar*, prevails and the District Court has jurisdiction; if they have, or if they are convicted at *any* point in their habeas proceeding, including on appeal, the rule in *Munaf* prevails and the Court's jurisdiction is ousted. No further development of the doctrine in the D.C. Circuit – the sole effective forum for citizens detained overseas – can bring reason to this rule.[9]

The lower court candidly conceded that this result was irrational and confessed its inability to understand "why, in cases such as this," the mere fact of Mr. Munaf's conviction should deprive him of a forum to test the lawfulness of his detention and threatened transfer. *Munaf*, App. A at 6. Still, the court considered itself "constrained" by *Hirota*, where the petitioner had also been convicted by a foreign tribunal. *Id.* at 2. But there is a simple solution to the lower court's conundrum: *Hirota* did not turn on the mere fact of a foreign conviction; it turned on the fact that the petitioner tried to challenge that conviction in this Court.

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[9] Rules concerning citizens detained overseas, much like patent cases, will rarely if ever develop into circuit splits because all such cases are typically filed in one federal circuit. *Cf.* R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* § 4.21 p. 263 (8th ed. 2002) (because "conflict among and with other federal courts [in patent cases] has been virtually eliminated[,]" decisions about certiorari "now turn largely on the importance of the questions presented").

Bare recitation of *Hirota*'s facts reveals how far that case is from this, and why the Circuit Court's expansion of *Hirota* was wholly unwarranted. Koki Hirota was a former Foreign Minister and Prime Minister of Japan. He swore allegiance to the Imperial Emperor and held governmental posts through the barbarous Rape of Nanking. For his role in these atrocities, Hirota was convicted of war crimes after a trial before a panel of eleven international judges, a trial that lasted almost two years. Pet'n for Writ of Habeas Corpus at 22, *Hirota v. MacArthur*, 338 U.S. 197 (1948) (No. 239). After his trial, Hirota attempted to mount a collateral challenge to the judgment and conviction of the foreign tribunal by seeking leave to file a habeas petition directly in this Court.

His petition contained three main arguments: that General MacArthur exceeded his constitutional authority in creating the international military tribunal; that the predicate acts for conviction were "beyond the scope and purview of the Japanese instrument of surrender"; and that the commission deprived him of the rights essential to a fair trial. *See* Pet'n for Writ of Habeas Corpus at 34, *Hirota v. MacArthur*, 338 U.S. 197 (1948) (No. 239); Brief of Petitioner-Appellant at 18-22, *Hirota v. MacArthur*, 338 U.S. 197 (1948) (No. 239) (tribunal deprived Hirota of right to cross-examine accusers, misapplied the rules of evidence, and ignored proscriptions contained in Bill of Attainder and *Ex Post Facto* Clauses of U.S. Constitution).

Hirota, in short, asked the Court to second-guess the legitimacy and operation of a foreign court. But it is axiomatic that an American court does not provide collateral review of the proceedings in a foreign tribunal. *Cf. Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004) ("the courts of one state will not question the validity of

public acts . . . performed by other sovereigns within their own borders, even when such courts have jurisdiction"); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) ("[T]he courts of one country will not sit in judgment on the acts of the government of another done within its own territory."). In this respect, the result in *Hirota* is uncontroversial.[10]

By contrast, the litigation that Mr. Munaf commenced in the District Court stands on an entirely different footing. Though Mr. Munaf has been convicted by an Iraqi court, he does *not* challenge his foreign conviction or sentence. Instead, he challenges the legality of three specific actions taken or threatened *by his American jailers*: 1) holding him 24 months without legal justification;[11] 2) interfering in the Iraqi proceedings in order to create the conviction now relied upon by the government to strip the courts of jurisdiction;[12] and 3) delivering him to

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[10] Hirota's litigation suffered from a second fatal defect as well. As the lower court recognized, he sought leave to file directly in the Supreme Court. *Munaf*, App. A at 2; *see also Omar v. Harvey*, No. 06-5126, Slip Op. at 11 (D.C. Cir. Feb. 9, 2007) (*Hirota* was filed "as an original petition for habeas corpus"). But jurisdiction in that instance is either original or appellate. U.S. Const. Art. III, § 2, cl. 2. Hirota's litigation was neither, and the Court had no choice but to deny him leave to file his habeas petition.

[11] The Court of Appeals in *Omar* correctly recognized this distinction. *See Omar*, Slip. Op. at 12 (Omar "seeks not to collaterally attack a final international conviction, but only to test the lawfulness of his extrajudicial detention in Iraq, where he has remained in the control of U.S. forces for over two years without legal process.").

[12] It is well-established that the district courts will investigate on habeas corpus whether American officials have directed or participated in the ostensibly independent actions of a foreign sovereign. *See, e.g., Barr v. United States Department of Justice*, 819 F.2d 25, 27-28 (2d Cir. 1987) (U.S. government bears legal responsibility for actions that foreign government takes at its request); *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 64 (D.D.C. 2004) (court has jurisdiction over habeas

(Continued on following page)

face execution by the Iraqi Government without the requisite judicial inquiry into whether that transfer is lawful.[13] While the outcome of these claims turns on

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petition filed by U.S. citizen held in Saudi Arabia to determine whether U.S. controls his detention).

In this case it is undisputed that Lt. Pirone purported to act on behalf of the Government of Romania at Mr. Munaf's trial. But it is sharply disputed whether he had any authorization from Romania to do so. *Compare* J.A. 52 (declaration of Robert M. Pirone stating he was authorized to act by the Romanian Embassy in Iraq) *with* J.A. 86 (Romanian "Embassy has not authorized any American official to represent the Romanian Government during the Iraqi judicial procedures") *and* U.N. HRC, Communication No. 1539/2006, *Munaf v. Romania* (CCPR), Submissions of Romanian Gov't on Admissibility, ¶21 (Mar. 5, 2007) ("Romanian representatives from the Embassy in Iraq had no knowledge either of the trial, nor of the alleged authorization allegedly given by the Romanian authorities to US officer Robert Pirone.") (available at http://www.brennancenter.org/dynamic/subpages/download_file_49032.pdf and http://www.brennancenter.org/dynamic/subpages/download_file_49034.pdf; *and id.* at Annex 4 ("The Ministry of Justice never empowered any American official to represent Romania within the Iraqi legal proceedings concerning Mohammad Munaf and has no knowledge of the existence of such a delegation"). The district court must resolve this factual conflict on remand.

[13] *See Valentine, supra*; *Laubenheimer, supra*. In the District Court, the government conceded that no treaty or statute authorized Mr. Munaf's transfer to Iraqi custody. Arg. Tr., *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006) (No. 06-1455). In the Court of Appeals, Judge Randolph ignored that concession and opined that "the Congressional Authorization for Use of Military Force Against Iraq . . . in conjunction with United Nations Security Council Resolutions 1546 and 1637," provided sufficient legal basis for the transfer. *Munaf*, App. A at 8-9 (Randolph, J., concurring in the result) (citations omitted). Perhaps mindful of its concession below, the government did not advance such an argument in the lower courts, and Mr. Munaf has never had an opportunity to be heard on this matter. At a minimum, the lawfulness of Mr. Munaf's transfer raises complex questions that lie at the intersection of extradition law, treaty law, the laws of war, and customary international law, none of which was addressed by Judge Randolph in his hasty short-circuit of the judicial process. But Judge Randolph

(Continued on following page)

factual inquiries that the District Court must conduct on the merits, each claim falls squarely within the heartland of habeas.

In sum, the decision below introduces needless confusion into the law of prisoner transfers because it fails to recognize the difference between a collateral challenge to the judgment of a foreign tribunal and a direct challenge to the detention by American jailers. Oblivious to this difference, the Court of Appeals has made a citizen's right to the Great Writ turn on the timing of a foreign tribunal's judgment. The Court should grant review to restore reason to the doctrine.

b. Neither An Executive Agreement Nor A U.N. Resolution Can Suspend The Great Writ.

While the Court of Appeals placed principal reliance on the fact of Mr. Munaf's conviction, it also mentioned several times that Mr. Munaf's custodians were part of an international, or multinational, force. *Munaf*, App. A at 3, 4, 5. The lower court did not elaborate on the significance of this fact except to imply that it helped bring the case within an unexpressed penumbra of *Hirota*. *Id.* at 4 ("As in *Hirota*, Munaf's case involves an international force, detention overseas, and a conviction by a non-U.S. court."). But the Executive's decision to participate in the MNF-I has no effect on the habeas jurisdiction of a federal court.

It is inherent in our constitutional democracy that our government cannot entreat with a foreign sovereign to do

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was correct in one respect: these issues go to the merits, and not to jurisdiction. They must be taken up on remand.

that which the Constitution forbids. In *Reid v. Covert*, 354 U.S. 1 (1957), for instance, the government argued that an executive agreement between the United States and Great Britain vested military courts with exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their dependents. Pursuant to this agreement, the United States tried and convicted Covert before a military tribunal. *Reid*, 354 U.S. at 15-16 (plurality opinion).[14] Covert protested that the tribunal had not provided for trial by jury, in violation of the Sixth Amendment. Defending the conviction, the government invoked the executive agreement and argued that it prevailed over the Constitution. *Id.* at 16.

The Court emphatically disagreed: "The United States is entirely a creature of the Constitution. Its power and authority have no other source. . . . [N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Id.* at 5-6, 16. This part of the *Reid* plurality, of course, has long been the law. *See, e.g., Missouri v. Holland*, 252 U.S. 416, 432-34 (1929) (treaty cannot authorize the national government "to do that which the Constitution forbids"); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) (treaty power cannot "authorize what the Constitution forbids").

At the same time, the Court has long held that the constitutional authority to suspend the writ lies in Congress, not the Executive. *See, e.g., Ex parte Bollman*, 8 U.S. 75, 101 (1807) ("If at any time the public safety

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[14] *See* Executive Agreement of July 27, 1942, 57 Stat. 1193 (cited in *Reid v. Covert*, 354 U.S. 1, 16 n.29 (1957)).

should require the suspension of [habeas] ... it is for the *legislature* to say so") (emphasis added); *Hamdi*, 542 U.S. at 562 (Scalia, J., dissenting on other grounds) ("[S]uspension must be effected by, or authorized by, a legislative act."); *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (Taney, C.J.) (President has no power to suspend habeas).

The lower court turned these ancient doctrines upside down. If membership in the MNF-I contributes somehow to the outcome, as the lower court implies, then a unilateral determination by the Executive to participate in multilateral military operations could suspend the Great Writ for American citizens, even in the teeth of congressional opposition.[15] The Court should take review of this case to correct this dangerous distortion of settled separation-of-powers law.

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[15] Not even the government suggests that Congress has suspended the habeas writ for citizens. On the contrary, as the Court knows, in late 2006, Congress passed the Military Commissions Act, divesting the district courts of habeas jurisdiction over certain *alien* "enemy combatants." 28 U.S.C. § 2241(e)(1); Military Commissions Act of 2006, P.L. 109-366, 120 Stat. 2600 (Oct. 17, 2006). Conspicuously, the MCA *does not* apply to U.S. citizens – a point repeatedly emphasized by its drafters and supporters. During a floor debate in the Senate, for instance, Jon Kyl (R-AZ) insisted: "This legislation has nothing to do with citizens. The decision cited by the Senator from Pennsylvania is the *Hamdi* decision, which dealt with a U.S. citizen. *And, of course, the writ of habeas corpus applies to U.S. citizens.*" 152 Cong. Rec. S10243-01, S10267, 2006 WL 2771411 (Sept. 27, 2006) (emphasis added). Similar declarations echoed throughout the House. The "limitations on habeas corpus," California Representative Dan Lungren explained, "only apply to alien enemy combatants. . . . *[U]nder the expressed terms of the bill, an American citizen will have the unencumbered ability to challenge his or her detention as they have under the Constitution.*" 152 Cong. Rec. H7925-02, H7946, 2006 WL 2796911 (daily ed. Sept. 29, 2006) (emphasis added).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the D.C. Circuit Court of Appeals. On review, the ruling of that court that the District Court lacked subject matter jurisdiction should be reversed, and the case remanded for further proceedings on the merits in the District Court.

Respectfully submitted,

JONATHAN HAFETZ
AZIZ Z. HUQ
BRENNAN CENTER FOR JUSTICE
NEW YORK UNIVERSITY SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
Telephone: (212) 998-6730
Facsimile: (212) 995-4550

SUSAN L. BURKE
KATHERINE HAWKINS
BURKE O'NEIL, LLC
4112 Station Street
Philadelphia, PA 19127
Telephone: (215) 487-6590
Facsimile: (215) 482-0874

JOSEPH MARGULIES
Counsel of Record
MACARTHUR JUSTICE CENTER
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
357 East Chicago Avenue
Chicago, IL 60611
Telephone: (312) 503-0890
Facsimile: (312) 503-1272

ERIC M. FREEDMAN
250 West 94th Street
New York, NY 10025
Telephone: (212) 665-2713
Facsimile: (212) 665-2714

VINCENT MOCCIO
AMY MAGID
ROBINS, KAPLAN, MILLER & CIRESI
2800 LaSalle Plaza
Minneapolis, MN 55402
Telephone: (612) 349-8500

Counsel for Petitioners

Dated: June 13, 2007

APPENDIX A

482 F.3d 582

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 16, 2007 Decided April 6, 2007

No. 06-5324

MOHAMMAD MUNAF AND
MAISOON MOHAMMED, AS NEXT FRIEND OF MOHAMMAD MUNAF,
APPELLANTS

v.

PETE GEREN, ACTING SECRETARY OF THE U.S. ARMY, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 06cv01455)

Joseph Margulies argued the cause for appellants. With him on the briefs were Jonathan L. Hafetz, Aziz Z. Huq, Eric M. Freedman, and Susan L. Burke.

Gregory G. Garre, Deputy Solicitor General, U.S. Department of Justice, argued the cause for appellees. With him on the brief were Peter D. Keisler, Assistant Attorney General, Jeffrey A. Taylor, U.S. Attorney, David B. Salmons, Assistant to the Solicitor General, Douglas N. Letter, Litigation Counsel, and Lewis Yelin, Attorney.

Before: SENTELLE, RANDOLPH and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SENTELLE.

Opinion filed by *Circuit Judge* RANDOLPH, concurring in the judgment.

SENTELLE, *Circuit Judge*: Mohammad Munaf, an American citizen, traveled to Iraq in 2005. In October 2006 he was convicted on kidnapping charges and sentenced to death by the Central Criminal Court of Iraq ("CCCI"). He is being held, in Iraq, by United States military personnel serving as part of the Multi-National Force-Iraq ("MNF-I"). Munaf sought a writ of habeas corpus in the United States District Court for the District of Columbia, naming the Secretary of the Army and others as respondents. Soon after Munaf's conviction by the Iraqi criminal court, the district court held that it lacked jurisdiction and dismissed the petition. *Mohammed v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006). Munaf appeals. Constrained by precedent, we hold that the district court does not have the power or authority to entertain Munaf's petition and we therefore affirm.

Our result is required by the Supreme Court's decision in *Hirota v. MacArthur*, 338 U.S. 197 (1948), as that decision has been applied by this court in *Flick v. Johnson*, 174 F.2d 983 (D.C. Cir. 1949), and interpreted by *Omar v. Harvey*, No. 06-5126 (D.C. Cir. Feb. 9, 2007). In *Hirota*, Japanese citizens sought permission to file petitions for writs of habeas corpus directly in the United States Supreme Court. The petitioners were held in Japan, where they had been tried by a military tribunal authorized by General Douglas MacArthur acting as the Supreme

Commander for the occupying Allied Powers, *Hirota,* 338 U.S. at 198. In a short per curiam opinion the Supreme Court concluded that the sentencing tribunal "[was] not a tribunal of the United States" and held that "[u]nder the foregoing circumstances the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners." *Id.*

Flick involved a habeas petition filed in the United States District Court for the District of Columbia by a German citizen held in Germany by American forces after he was convicted by a military tribunal. 174 F.2d 983. Relying on *Hirota,* we framed the jurisdictional question as follows: "Was the court which tried and sentenced Flick a tribunal of the United States? If it was not, no court of this country has power or authority to review, affirm, set aside or annul the judgment and sentence imposed on Flick." *Id.* at 984. Finding that the military tribunal was not a U.S. court, we held that the district court lacked jurisdiction to review Flick's habeas petition. *Id.* at 986.

Our recent decision in *Omar* involved a habeas petition filed on behalf of a United States citizen being held in Iraq by U.S. forces acting as part of the MNF-I. *Omar,* slip op. at 2. As in *Hirota* and *Flick*, *Omar* involved detention overseas and a multinational force. But unlike the petitioners in *Hirota* and *Flick,* Omar had not been charged or convicted by a non-U.S. court. We distinguished *Hirota* and *Flick* on this basis and went on to hold that the district court had jurisdiction to hear Omar's habeas claim. Slip op. at 12-14.

Unlike *Omar*, the instant case is controlled by *Hirota* and *Flick*. The MNF-I is a multinational force, authorized

by the United Nations Security Council, that operates in Iraq in coordination with the Iraqi government. The CCCI is an Iraqi criminal court of nationwide jurisdiction and is administered by the government of Iraq; it is not a tribunal of the United States. Accordingly, the district court has no power or authority to hear this case.

Munaf contends that *Hirota* and *Flick* do not control because, like Omar and unlike the petitioners in *Hirota* and *Flick*, Munaf is a United States citizen.[1] *See, e.g.*, *Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950) (describing citizenship as "a head of jurisdiction and a ground of protection"). But Munaf's citizenship does not take his case out of the ambit of *Hirota* and *Flick*. *Hirota* did not suggest any distinction between citizens and noncitizens who were held abroad pursuant to the judgment of a non-U.S. tribunal. Indeed, Justice Douglas wrote a separate opinion criticizing the *Hirota* majority for seeming to foreclose habeas review even for American citizens held in such circumstances. *See* 338 U.S. at 204-05 (Douglas, J., concurring) (1949). In *Omar*, we held that "the critical factor in *Hirota* was the petitioners' convictions by an international tribunal." Slip op. at 12. We explained that, because *Hirota* "articulates no general principle at all," the decision is controlling as a matter of precedent if the circumstances important to the Court's decision are present here. *Id.* at 11. As in *Hirota*, Munaf's case involves an international force, detention overseas, and a conviction by a non-U.S. court. As we noted in *Omar*, conducting habeas proceedings in the face of such a conviction risks judicial second-guessing of a non-U.S. court's judgments

[1] Munaf was born in Iraq and was naturalized as a United States citizen in 2000.

and sentences, and we explained that *Hirota*'s repeated references to the petitioners' sentences "demonstrate [] that the Court's primary concern was that the petitions represented a collateral attack on the final judgment of an international tribunal." *Id.* at 12-13. Whether a habeas petition represents a collateral attack on a conviction by a non-U.S. court is not dependent on the petitioner's citizenship. In light of the precedent established by *Hirota*, specifically as interpreted in *Flick* and *Omar*, American citizenship cannot displace the fact of a criminal conviction in a non-United States court and permit the district court to exercise jurisdiction over Munaf's habeas petition.

Munaf also argues that he does not challenge his conviction by the Iraqi court but rather the lawfulness of his detention at the hands of United States military personnel. As with Munaf's citizenship argument, we do not think that *Hirota* and *Flick* can be distinguished on this ground. In *Hirota* and *Flick*, as in this case, U.S. forces who were operating as part of a multinational force detained the petitioners. And as in those cases, continued confinement is dependent on a conviction by a court not of the United States – specifically, a multinational tribunal in *Hirota* and *Flick* and, in this case, the CCCI, which is a foreign tribunal. The fact that the MNF-I is not an arm of the Iraqi government but rather cooperates with Iraq and its courts in matters of detention does not bring this case outside the scope of *Hirota*. Munaf states in his brief that "[e]ven if the Iraqi charges were dismissed tomorrow the United States does not suggest [Munaf] would be released." But the district court's jurisdiction to inquire into such matters is precisely the issue; if the charges were dismissed, and United States forces were to continue to hold Munaf, this would be a different case. Under *Omar*

the district court arguably *would* have jurisdiction over Munaf's habeas claim.[2] *See Omar*, slip op. at 14.

* * *

One final point deserves emphasis. In holding that the district court lacks jurisdiction, we do not mean to suggest that we find the logic of *Hirota* especially clear or compelling, particularly as applied to American citizens. In particular, Hirota does not explain why, in cases such as this, the fact of a criminal conviction in a non-U.S. court is a fact of jurisdictional significance under the habeas statute. And as we acknowledged in *Omar*, the Supreme Court's recent decisions in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Rasul v. Bush*, 542 U.S. 466 (2004), are grounds for questioning *Hirota*'s continued vitality. *Omar*, slip op. at 9. But we are not free to disregard *Hirota* simply because we may find its logic less than compelling. "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Id.* at 9 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

For the reasons discussed above, the judgment of the district court is

Affirmed.

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[2] Munaf's conviction was automatically appealed to the Iraqi Court of Cassation. At oral argument, Munaf's counsel stated that the status of that appeal is unclear.

RANDOLPH, *Circuit Judge,* concurring in the judgment.

I believe the district court had jurisdiction over Munaf's habeas corpus petition. The critical considerations are that Munaf is an American citizen and that he is held by American forces overseas. *Hirota v. MacArthur,* 338 U.S. 197 (1948) (per curiam), in which the habeas petitioners were Japanese citizens held in Japan, therefore does not apply. There is a longstanding jurisdictional distinction between citizens and aliens detained outside the sovereign territory of the United States. In *Johnson v. Eisentrager,* 339 U.S. 763, 781 (1950), decided two years after *Hirota,* the Court held that it lacked jurisdiction to issue writs of habeas corpus for German prisoners held by the United States in Germany. But the Court stated that its holding did not apply to American citizens, to whom the "Court long ago extended *habeas corpus*" when they were held outside the United States. *See id.* at 769-70 (citing *Chin Yow v. United States,* 208 U.S. 8 (1908)).

It is hardly surprising then that eight of the nine Justices in *Rasul v. Bush*, 542 U.S. 466 (2004), explicitly agreed that American citizens held by American officials overseas could invoke habeas jurisdiction. For himself and four other Justices, Justice Stevens wrote that "[a]liens held at the [Guantanamo Bay Naval] base, no less than American citizens, are entitled to invoke the federal courts' authority under [28 U.S.C.] § 2241." *Id.* at 481. Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, stated that "[n]either party to the present case challenges the atextual extension of the habeas statute to United States citizens held beyond the territorial jurisdictions of the United States courts," "[a]nd *that* position – the position that United States citizens throughout the world may be entitled to habeas corpus rights – is precisely the

position that this Court adopted in *Eisentrager* . . . even while holding that aliens abroad *did not have* habeas corpus rights." *Id.* at 497, 502 (Scalia, J., dissenting) (citation omitted).

It is true that *Omar v. Harvey*, No. 06-5126, slip op. at 12 (D.C. Cir. Feb. 9, 2007), distinguished *Hirota* and *Flick v. Johnson*, 174 F.2d 983 (D.C. Cir. 1949), on the ground that in both cases the alien petitioners held overseas had been convicted by an international tribunal. But *Omar* did not speak to the jurisdictional issue confronting us here. To extend *Hirota* to habeas petitions filed by American citizens not only would contradict *Eisentrager* and the majority and dissenting opinions in *Rasul*, but also would constitute an unwarranted extension of an opinion that "articulates no general legal principle at all," *Omar*, slip op. at 11.

Habeas petitions test the legality of detention. The fact that the United States is holding Munaf because of his conviction by a foreign tribunal thus goes to the question whether he is entitled to the writ, not to the question whether the court has jurisdiction to consider the petition. *See Bell v. Hood*, 327 U.S. 678, 681 (1946). As to the merits, I believe *Wilson v. Girard*, 354 U.S. 524 (1957), is conclusive. After Japan indicted a United States soldier for killing a Japanese woman in Japan, the soldier sought a writ of habeas corpus in the United States District Court for the District of Columbia to prevent his transfer to Japanese authorities. *Id.* at 525-26. The district court denied the writ on the merits but issued a preliminary injunction against the soldier's transfer. *Girard v. Wilson*, 152 F. Supp. 21, 27 (D.D.C. 1957). Referring to a Security Treaty between the United States and Japan, the Supreme Court upheld the denial of the writ but reversed the grant

of the injunction, 354 U.S. at 530, reasoning that a "sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction," *id.* at 529 (citing *Schooner Exchange v. M'Faddon,* 11 U.S. (7 Cranch) 116, 136 (1812)). In Munaf's case, the Congressional Authorization for Use of Military Force Against Iraq, Pub. L. No. 107-243, 116 Stat. 1498 (2002), in conjunction with United Nations Security Council Resolutions 1546, U.N. Doc. S/RES/1546 (June 8, 2004), and 1637, U.N. Doc. S/RES/1637 (Nov. 11, 2005), commands the same result. *Cf. Holmes v. Laird,* 549 F.2d 1211, 1219 n.59 (D.C. Cir. 1972).

APPENDIX B

456 F.Supp.2d 115

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAISOON MOHAMMED, *et al.*,	
Petitioners,	**Civil Action No. 06-1455 (RCL)**
v.	
FRANCIS J. HARVEY, *et al.*,	(Filed Oct. 19, 2006)
Respondents.	

MEMORANDUM OPINION

This matter comes before the Court on a motion[6] and supplemental motion [12] for temporary restraining order seeking injunctive relief pending the Court's review of a petition for writ of habeas corpus. [1] Upon consideration of the petition, the memorandum in support of the motion for temporary restraining order, the opposition and the reply thereto, the applicable law, the entire record herein, and after hearing argument, the Court dismisses the petition *sua sponte* for lack of subject matter jurisdiction. As such, the Court also dismisses the motion for temporary restraining order as moot. The Court's reasoning is set forth below.

I. BACKGROUND

The petitioner, Mohammad Munaf,[1] was born in Iraq in 1952 and became a United States citizen in 2000. Mohammed Decl. ¶¶ 2, 4, 7.[2] He is married to a Romanian woman, split residences between Romania and the United States from 1996 to 2001, and since 2001 has lived solely in Romania. *Id.* ¶¶ 5, 6, 9. In March 2005 he traveled from Romania to Iraq with several Romanian journalists. *Id.* ¶ 10. Shortly after their arrival, the group was kidnapped and held captive for almost two months by a group claiming to be the "Muadh Ibn Jabal Brigade." *Id.* ¶¶ 11-13. Their release was secured in May 2005 during a raid by military troops under the command of Multi-National Force-Iraq ("MNF-I"). Gardner Decl. ¶¶ 3-4.

MNF-I is a military force described as "a coalition authority consisting of approximately twenty-seven different nations that operates in accordance with the mandate of United Nations Security Council Resolutions (UNSCR) 1546 and 1637 (2005)." Gardner Decl. ¶ 2; *see also* Respondents' Opposition to Petitioners' Motion for a Temporary Restraining Order [9-1] ("Opp."), Ex. 2

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[1] The petition in this case was brought on behalf of Munaf by his sister, Maisoon Mohammed, as next friend. For ease of reference, the Court will use the singular "petitioner" to refer to Munaf.

[2] Ms. Mohammed's affidavit consists partly of matters within her personal knowledge and partly of hearsay statements. Petitioner also submits three declarations of Sean Riordan, a law student and legal intern for petitioner's American legal counsel, who speaks Arabic. These declarations consist of Riordan's accounts of his conversations, in Arabic, with one of petitioner's sisters, *see* First Riordan Decl. and Third Riordan Decl., and with petitioner's Iraqi lawyer, *see* Second Riordan Decl., both of whom are in Iraq. Portions of these declarations contain additional layers of hearsay. At this stage of the proceedings, the Court will consider all of the materials before it.

(Resolution 1546), Ex. 3 (Resolution 1637). Under this limited mandate, which is set to expire at the end of 2006 unless renewed, MNF-I operates "on behalf of and at the request of the Iraqi government" in Iraq. Gardner Decl. ¶ 2. MNF-I's power under the U.N. Resolutions includes the authority to detain prisoners who pose a threat to security in Iraq. MNF-I and the government of Iraq have agreed that MNF-I will maintain physical custody of prisoners awaiting criminal prosecution in Iraqi courts, as Iraq lacks much of the infrastructure necessary for maintaining its own prisoners. *Id.* ¶¶ 2-3; Opp. at 4.

Since the MNF-I raid, petitioner Munaf has been held as a prisoner by MNF-I troops at Camp Cropper, a military installation located at the Baghdad International Airport. Petition ¶ 3. It has been alleged that petitioner was a willing participant in a kidnapping-for-profit scheme, in that he posed as a kidnap victim and led the actual victims into a trap.[3] Gardner Decl. ¶¶ 4-5, 11-14. Petitioner maintains he is innocent of any criminal wrongdoing, and that he is not and has never been a member of al Qaeda in Iraq or any other terrorist group. Petition ¶ 22.

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[3] According to respondents, petitioner's role in the scheme was to travel to Iraq with the journalists, "ostensibly as their guide and translator and help facilitate the kidnapping." Gardner Decl. ¶ 13. The alleged "mastermind" of the plot would then negotiate the release of the Romanians, which would "increase his own stature" and help him "gain the support of the Romanian President Traian Basescu to develop new business in Romania." *Id.* ¶¶ 11-12. The kidnappers called themselves the "Muadh Ibn Jabal Brigade" and demanded payment of a ransom and that Romania withdraw its troops from Iraq. Mohammed Decl. ¶ 12.

Petitioner alleges that for the first five months of his detention, he was held incommunicado. Petition ¶ 4. Since then, he has had limited contact with his family and with an Iraqi attorney. *Id.* Two months after petitioner was taken into custody, he appeared before a three-person panel of MNF-I officers who conducted "a comprehensive review of Munaf's status and detention." Opp. at 7; Gardner Decl. ¶ 5. The panel interviewed witnesses and reviewed "available intelligence information." Gardner Decl. ¶ 5. Petitioner was present at the hearing and had an opportunity to hear the basis for his detention and to make a statement. *Id.* The panel found that petitioner should be considered a "security internee," as defined in U.N. documents, and should continue to be detained pursuant to MNF-I's U.N. mandate. *Id.*

Munaf's case was referred to the Iraqi government. Gardner Decl. ¶ 6. The government instituted criminal proceedings in the Central Criminal Court of Iraq ("CCCI"), an Iraqi court that is staffed by Iraqi citizens and applies Iraqi law. *Id.* ¶ 7. Munaf has appeared at four CCCI "Investigative Hearings," each time with his Iraqi attorney. *Id.* ¶ 15. At two of these hearings Munaf appeared as a witness against other defendants, and at the other two he appeared as the defendant in his own prosecution. *Id.* The Investigative Hearing Judge concluded that there was sufficient evidence to refer Munaf's case to the Trial Court as a defendant. *Id.* Respondents allege that Munaf has confessed his role in the kidnapping on camera, in writing, and in front of the Investigative Hearing Judge. Gardner Decl. ¶ 11. Munaf counters that any incriminating statements he made were coerced. First Riordan Decl. ¶¶ 8, 11. Specifically, petitioner alleges that he has been threatened by "U.S. and Romanian officials,"

and that unspecified "[o]fficials" told him that if he did not confess, he, his sister, and his wife would be sexually assaulted. *Id.*

Through his sister as next friend, Munaf petitioned in this Court for a writ of habeas corpus on August 18, 2006. The petition named as respondents Francis J. Harvey, the United States Secretary of the Army; Maj. Gen. William H. Brandenburg, Deputy Commanding General of Detainee Operations for Task Force 134, MNF-I; and one "Colonel Steele," first name unknown, who is the alleged Commanding Officer of Camp Cropper. The petition calls for issuance of a writ compelling respondents to allow Munaf access to attorneys of his choice, to "establish a lawful basis for Mr. Munaf's detention or release him from custody," and to enjoin his transfer to Iraq authorities. On September 8, 2006, petitioner moved for a temporary restraining order to prohibit respondents from transferring him to the custody of the government of Iraq, pending resolution of his habeas petition. A hearing on the motion was held on October 10, 2006.

On October 12, 2006, petitioner and his five codefendants appeared before a three-judge Trial Panel of the CCCI to face kidnapping charges under the Iraqi Penal Code. Pirone Decl. ¶ 3. Petitioner was accompanied by his Iraqi counsel and had the opportunity to "submit any evidence or bring any witnesses." *Id.* ¶ 4. Indeed, petitioner did make a statement, reiterating his position that he was innocent and that his prior confession was coerced. Second Riordan Decl. ¶ 9. Petitioner claims that two "United States military officials" attended the hearing. *Id.* ¶ 7. He alleges that one was an American soldier who told the court he was appearing at the request of the Romanian embassy to seek the death penalty for the defendants. *Id.*

Petitioner alleges that the other was an American general "who told the judge in open court that the defendants should all be convicted and sentenced to death," and that one "Judge Al-Rubaay" disagreed with the general.[4] *Id.* at ¶¶ 7-8. At one point, defendants and their counsel were removed from the courtroom. Petitioner claims that the "American military officials" then met with the judge for about 15 minutes. *Id.* ¶ 12.

Respondents explain that Robert Pirone, a Coast Guard Lieutenant who serves as an attorney at the CCCI Liaison Office in Baghdad, was present at the hearing in his capacity as a participant in MNF-I. Pirone Decl. ¶ 1. According to Pirone's sworn affidavit, Pirone appeared at the trial to make a formal complaint for the Romanian government about the kidnapping, whose victims were all Romanian.[5] *Id.* ¶ 7. Pirone was under oath at the trial, and his notarized authorization to represent the Romanian Embassy had been submitted to the court weeks before the trial. *Id.* In his affidavit, Pirone attests that his role at the trial was limited to answering questions about the case, based on prior confessions by the defendants, and to making the formal complaint, a requirement under Iraqi law. *Id.* Petitioner and his codefendants were allowed to make statements, and counsel for the prosecution and

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[4] While petitioner mentions only one judge who was present at the hearing, respondents have identified three judges who were present. *See* Second Riordan Decl. ¶ 5; Pirone Decl. ¶ 3. The use of a three-judge panel is consistent with the Trial Panel procedure previously described by respondents. Gardner Decl. ¶ 9.

[5] Romania participates in MNF-I. Opp. at 3 n.1.

defendants made arguments.[6] Second Riordan Decl. ¶¶ 9-10; Pirone Decl. ¶¶ 6-9. The Trial Panel questioned the defendants and called additional witnesses. Pirone Decl. ¶¶ 6-7.

Pirone attests that no other member of MNF-I participated in the trial in any way, and that any MNF-I personnel who were present were there only as observers or guards. *Id.* ¶ 8. There was no American general present, nor a general of any other MNF-I member nation. *Id.* Pirone states that when the courtroom was closed, he left the room and spent the entire recess talking with petitioner's attorney. *Id.* ¶ 10. He also says that no MNF-I personnel were with the judges while they deliberated. *Id.* When the hearing was reconvened, the court found petitioner and his five codefendants[7] guilty of kidnapping and sentenced them all to death.

A standard practice is followed when an MNF-I detainee is convicted of criminal charges by the CCCI. Gardner Decl. ¶ 17. First, the Trial Court issues an order to the Deputy Commanding General for Detainee Operations of MNF-I, who is a respondent in this case.[8] *Id.* In

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[6] Petitioner and four of his codefendants recanted their prior confessions before the Trial Panel, claiming they had been coerced. Second Riordan Decl. ¶ 9; Pirone Decl. ¶ 6.

[7] Munaf's codefendants were held in the custody of the Iraqi government and were never in the custody of MNF-I. Pirone Decl. ¶ 4.

[8] The habeas petition names as a respondent one "Major General William H. Brandenburg, Deputy Commanding General (Detainee Operations)/Commanding General, Task Force 134, Multi-National Force-Iraq." Respondents have identified the proper respondent as Major General John D. Gardner in his capacity as the "Deputy Commanding General for Detainee Operations (DCG-DO) Multi-National Force-Iraq." Gardner Decl. ¶ 1.

response, the Deputy Commanding General for Detainee Operations issues a transfer order releasing the detainee to an Iraqi Ministry of Justice facility. *Id.* It typically takes two to three weeks to process a transfer. *Id.* A defendant under sentence of death in Iraq has a statutory right to an automatic appeal to the Iraqi Court of Cassation. Pirone Decl. ¶ 13. The defendant has 30 days from the day after sentencing to submit material to the Court of Cassation. *Id.*

II. ANALYSIS

A. Standard for Reviewing Habeas Corpus Petition for Jurisdiction

"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed. R. Civ. P. 12(h)(3). If a court determines that it lacks subject matter jurisdiction, it therefore is duty bound to dismiss the case on its own motion. In considering the legal sufficiency of the jurisdictional allegations in a petition for habeas corpus, the Court takes the petitioners' factual allegations as true, drawing all reasonable inferences in the petitioners' favor. *See Hawk v. Olson,* 326 U.S. 271, 272 (1945); *Phoenix Consulting, Inc. v. Republic of Angola,* 216 F.3d 36, 39 (D.C. Cir. 2000). But in determining its own jurisdiction, the Court is not limited to the allegations in the petition. *See Hohri v. United States,* 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds,* 482 U.S. 64 (1987). The Court may examine materials outside the pleadings as appropriate to determine whether it has jurisdiction over the subject matter. *See Herbert v. Nat'l Acad. of Sciences,* 974 F.2d 192, 197 (D.C. Cir. 1992).

Petitioner alleges that a "U.S. citizen detained in the custody of federal officials in violation of the Constitution, laws, or treaties of the U.S. unquestionably has the right to challenge that detention in federal court once personal jurisdiction over the petitioner's custodian is established." Petition ¶ 8. He alleges that he "is detained by U.S. officials at a detention facility known as Camp Cropper. The facility is under the control of the U.S. military and within the plenary and exclusive jurisdiction or dominion exercised in fact of the U.S." *Id.* ¶ 9. He contends that he is "in U.S. custody." *Id.* ¶ 21. Respondents counter that "[a]lthough United States Armed Forces participate in the detention [of detainees pending CCCI prosecutions], they do so not *qua* the United States but as part of their role in MNF-I." Opp. at 8.

B. Habeas Corpus Jurisdiction

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction[.]" *Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375, 377 (1994). The principal source of jurisdiction alleged in this case is the habeas corpus statute applicable to the federal government, 28 U.S.C. § 2241 (2006). In pertinent part, it states that the:

> writ of habeas corpus shall not extend to a prisoner unless –
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
>
> (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
>
> (5) it is necessary to bring him into court to testify or for trial.

28 U.S.C. § 2241(c). The application for the writ must "allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known." *Id.* at § 2242. If the writ is granted, it "shall be directed to the person having custody of the person detained," who can therefore "be required to produce at the hearing the body of the person detained." *Id.* at § 2243.

Under these terms, "[t]he turnkey of the habeas statute is the requirement of custody." *Abu Ali v. Ashcroft*, 350 F.Supp. 2d 28, 45 (D.D.C. 2004). A court has jurisdiction to issue the writ only if the petitioner is "in custody under or by color of the authority of the United States" or "in violation of the Constitution or laws or treaties of the United States," or other elements not relevant here. A central prerequisite for habeas relief is that the court must have the ability to force compliance by the petitioner's custodian, because "[t]he writ of habeas corpus does not

act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." *Braden v. 30th Judicial Circuit Court of Kentucky,* 410 U.S. 484 (1973). The identity of the custodian is crucial because the writ:

> is directed to, and served upon, not the person confined, but his jailor. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent, and if he fails to obey it, the means to be resorted to for the purposes of compulsion are fine and imprisonment.

In the Matter of Samuel W. Jackson, 15 Mich. 417, 439-40 (1867).

The Supreme Court has "very liberally construed the 'in custody' requirement for purposes of federal habeas." *Maleng v. Cook,* 490 U.S. 488, 492 (1989). For habeas jurisdiction to exist, the prisoner must be "held in actual or constructive custody by the respondents named in the petition, or by any other person or persons subject to the jurisdiction of the District Court." *United States ex rel. Keefe v. Dulles,* 222 F.2d 390, 392 (D.C. Cir. 1954). The converse must also be true: if the petitioner is in custody under some authority other than the United States, there is no habeas jurisdiction. For instance, where a U.S. citizen was held in a French jail by the authority of a French court, a U.S. court did not have jurisdiction over his habeas petition. *Id.* at 391 ("For obvious reasons, [petitioner] did not ask that the writ be directed to the foreign jailer.").

A prisoner is in the constructive custody of the United States when he is in the actual, physical custody of some person or entity who cannot be deemed the United States, but is being held under the authority of the United States or on its behalf. Constructive custody has been found in cases of actual custody between one state and another, *Braden v. 30th Judicial Circuit Court of Kentucky,* 410 U.S. 484 (1973) (prisoner in actual custody of state of Alabama found to be in constructive custody of Kentucky for habeas purposes); between a state and a private prison, *Stokes v. United States Parole Comm'n,* 374 F.3d 1234, 1238 (D.C. Cir. 2004), *Skelton v. Pri-Cor, Inc.,* 963 F.2d 100, 102 (6th Cir. 1991); between the United States and private individuals acting as its agent, *United States v. Jung Ah Lung,* 124 U.S. 621, 626 (1888) (petitioner held by harbormaster "in custody by direction of the customs authority of the port, under the provision of the Chinese restriction act," an act of Congress), *Chin Yow v. United States,* 208 U.S. 8 (1908) (petitioner held by manager of steamship company under similar authority); and between the United States and a foreign country that is used as the United States' "intermediary," *Abu Ali v. Ashcroft,* 350 F.Supp. 2d 28 (D.D.C. 2004).

The reach of the writ is not limited to the territorial jurisdiction of the United States courts where the immediate custodian is the United States. *See, e.g., Burns v. Wilson,* 346 U.S. 137 (1953) (finding jurisdiction over habeas claims by airmen detained under courts martial in Guam); *United States ex rel. Toth v. Quarles,* 350 U.S. 11 (1955) (finding jurisdiction over habeas petition by ex-airman facing court martial in Korea). The ultimate territorial scope of the writ remains an open question.

That question need not be answered in this case, because petitioner fails on a threshold requirement: he is not being held "under or by color of the authority of the United States" or "in violation of the Constitution or laws or treaties of the United States," as required under the habeas statute. Petitioner has alleged that he is "detained by U.S. officials" and "in U.S. custody." Petition ¶¶ 9, 21. But he is in the custody of coalition troops operating under the aegis of MNF-I, who derive their ultimate authority from the United Nations and the MNF-I member nations acting jointly, not from the United States acting alone. The United States has not asserted and does not profess to have the independent right to order that petitioner be moved, tried, punished, or released. Petitioner is thus under the actual, physical custody of MNF-I, a multinational entity separate and distinct from the United States or its army. He is in the constructive custody of the Republic of Iraq, which is seized of jurisdiction in the criminal case against him, and which controls his ultimate disposition. Petitioner thus has two custodians, one actual and the other constructive: MNF-I and the government of Iraq. Petitioner has not shown that either custodian is the equivalent of the United States for the purposes of habeas corpus jurisdiction.

1. Iraq as Custodian

Petitioner voluntarily entered the sovereign country of Iraq and has been convicted by the courts of that country for a violation of Iraqi law. The writ of habeas corpus will not reach to a foreign sovereign. *See, e.g., Duchow v. United States,* 1995 WL 425037 *1, *3, 95-cv-2121 (E.D. La. 1995) (U.S. citizen detained in Bolivia by Bolivian government not entitled to habeas relief). *See generally Ex*

parte Mwenya, [1960] 1 Q.B. 241 (summarizing evolution of British common law of habeas corpus, in which availability of the writ turns on the sovereign's control over the custodian). In exceptional cases where the United States acts through another country as an intermediary to hold a U.S. citizen, at the direction and under the ultimate control of the United States, the writ can be issued to the appropriate officials of the United States. *Abu Ali,* 350 F.Supp. 2d 28. But no evidence has been presented that the sovereign nation of Iraq is holding petitioner at the direction and under the ultimate control of the United States.

2. MNF-I as Custodian

It does not change the outcome to point out that Munaf is in the physical custody of U.S. troops in their capacity as participants in MNF-I. Where a U.S. citizen is detained under the authority of a multinational military entity, he is not in custody "under or by color of the authority of the United States," even if American military personnel play a role in his detention as part of their participation in that multinational force. Petitioner in this case is held by MNF-I, operating under international authority derived from the U.N. Resolutions. MNF-I has clearly asserted its authority over him by, for instance, conducting a hearing at which MNF-I determined that petitioner should be held as a security internee and that his case should be referred to CCCI.

In *Hirota v. General of the Army MacArthur,* 338 U.S. 197 (1948) (per curiam), Japanese citizens moved in the Supreme Court for leave to file habeas corpus petitions challenging their sentences under a military tribunal in

Japan. American military personnel participated in the tribunal, and the prisoners were in the physical custody of U.S. troops. General Douglas MacArthur, acting in his capacity as Supreme Commander for the Allied Powers, established the military tribunal "as the agent of the Allied Powers." *Id.* at 198. The Court denied the petitioners' motion because "the tribunal sentencing these petitioners is not a tribunal of the United States." *Id.* The Court traced the authority under which the tribunal acted and determined that it emanated from the multinational Allies and not the United States in its independent capacity. Because the prisoners were held under the authority of an entity that was "not a tribunal of the United States," the prisoners were not in the custody of the United States for purposes of habeas jurisdiction.

The rule recognized in *Hirota* was applied in *Flick v. Johnson,* 174 F.2d 983 (D.C. Cir. 1949), in which German citizens petitioned for habeas corpus to challenge their convictions by an Allied military tribunal in Germany following World War II. While the tribunal had been staffed by Americans and the petitioners were in the physical custody of American soldiers, the crucial question was the authority by which they were held: "If it was an international tribunal, that ends the matter." *Id.* at 985. Because the tribunal derived its authority from the Allies acting jointly in the immediate aftermath of the fall of Germany, it was not "a tribunal of the United States." Therefore "no court of this country has power or authority to review, affirm, set aside or annul the judgment and sentence imposed." *Id.* at 984.

Petitioner counters that the habeas applicants in those cases were not U.S. citizens. But nothing in *Hirota* or *Flick* purported to turn on whether the petitioners were

citizens. The courts were without jurisdiction because the petitioners were held under the authority of entities that were "not a tribunal of the United States." The identity of the custodian, and the concomitant lack of habeas jurisdiction, would remain the same regardless of the petitioners' citizenship. This is because, as stated previously, the writ acts upon the custodian, not the prisoner.

The fact that it is the identity of the custodian that matters most in this context, and not the citizenship of the prisoner, is demonstrated by *In re Yamashita*, 327 U.S. 1 (1946). There a Japanese commander petitioned for habeas corpus to challenge his sentence by a military tribunal in the Philippines. The Supreme Court traced the authority under which the tribunal was established: the authority emanated originally from the President of the United States as commander-in-chief, who directed the Joint Chiefs of Staff, who in turn commanded General MacArthur, acting in his capacity as "Commander in Chief, United States Arm [sic] Forces, Pacific," who in turn specifically ordered a U.S. Army general to establish the tribunal. *Id.* at 10. The tribunal derived its power entirely from the United States Executive and operated outside the framework of the Allied Powers. The Court found that there was habeas jurisdiction for a limited inquiry into the jurisdiction of the sentencing tribunal.

Hirota and *Yamashita*, taken together, recognized that General MacArthur acted in two capacities, as both an American and Allied commander, and evaluated the derivation of authority by which he and his subordinates held prisoners in custody. Therefore, prisoners who were in custody of the United States alone, under the sole

authority of the United States, could invoke habeas jurisdiction.[9] But prisoners who were held pursuant to the authority of the Allies, and who were in the physical custody of American soldiers acting as members of the Allied Powers, were in the custody of the Allies, not the United States, and therefore could not invoke the jurisdiction of the U.S. courts. *Flick* and *Madsen v. Kinsella,* 343 U.S. 341 (1952) are to the same effect for the European theater.

Petitioner claims that citizenship must have mattered in *Hirota* and *Flick* because there have been other cases where courts entertained habeas applications from citizens who were in the custody of the United States while it participated in a multinational force. But in each of these cases, the petitioner was held under the independent authority of the United States *qua* United States, not by a multinational force in which the United States participated. In all of those cases, the courts traced the authority of the custodian to its source to determine if the custodian was the United States or some other entity.

For instance, petitioner cites to *Madsen v. Kinsella,* 343 U.S. 341 (1952). In that case the Supreme Court found that there was jurisdiction to hear the habeas petition of a woman confined in a federal prison in West Virginia for

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[9] Courts have found jurisdiction to entertain habeas petitions from U.S. military personnel who were held or tried by American military tribunals or courts martial in various locations the world over. The jurisdiction has turned not on the location where the soldier was held, nor on the composition of the force in which he served – multinational or unilateral – but on the authority under which he was actually tried or held. *See, e.g., Burns v. Wilson,* 346 U.S. 137 (1953) (courts had jurisdiction over habeas claims of airmen tried by U.S. courts martial in Guam).

the murder of her serviceman-husband, whom she had killed in the American Occupied Zone of Germany shortly after World War II. She had been tried and sentenced in Germany by the "United States Court of the Allied High Commission for Germany" in 1950. This court, established unilaterally by the United States and with jurisdiction within the American zone of control, was a different court than the one at issue in *Flick*. It was a purely American creation and did not purport to exercise the authority of the Allies, and, moreover, petitioner was in custody in a United States federal prison in America.

Similarly, habeas jurisdiction was found to lie in the case of a former U.S. airman who was arrested by military officials in America and taken to Korea, where he was charged in a court martial with participating in a murder conspiracy in Korea during the Korean conflict. *United States ex rel. Toth v. Quarles,* 350 U.S. 11 (1955). Though America had participated in the Korean conflict under the auspices of a multinational United Nations force, the petitioner's court martial was an entirely American tribunal, established under the authority of an act of Congress.[10] Once again, the Court established at the outset that the tribunal derived its authority solely from the United States government. With the United States as custodian, habeas jurisdiction was proper, despite the fact that the prisoner and immediate custodian were in Korea.

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[10] Petitioner repeatedly conflates the authority by which U.S. troops operate within a military theater and the authority under which a prisoner is held. That the United States operates within a multinational military force does not cast all subsequent events in a multinational sheen. Thus courts must look to the substance of the matter and determine the source of authority for the detention.

Petitioner has argued that strong dicta in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), counsels a different result. After denying enemy aliens held abroad the right to sue in U.S. courts, the Supreme Court distinguished the rights of aliens from those of citizens, and opined that "[c]itizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection." *Id.* at 769. But in the very same paragraph, the Court identified two ways in which the courts protect citizenship: by issuing writs of habeas corpus to those in custody by the United States, and by hearing suits to declare a person a citizen "regardless of whether he is within the United States or abroad." *Id.* at 769-70. But the Court followed by noting that "[w]hen any citizen is deprived of his liberty by any foreign government, it is made the duty of the President to demand the reasons and, if the detention appears wrongful to use means not amounting to acts of war to effectuate his release." *Id.* at 770. The *Eisentrager* Court thus recognized that while citizenship may be a head of jurisdiction, it does not justify jurisdiction when the citizen is not held by the United States; the only remedies there are diplomatic, not judicial.

Most tellingly, *Eisentrager* recognized the distinction between custody by the authority of the United States and custody by the authority of a multinational entity. As the first matter it considered, the Court found that the petitioners were in the custody of a United States force that derived its authority solely from the United States, and that the "proceeding was conducted wholly under American auspices and involved no international participation."

Id. at 765. *Eisentrager* thus recognizes the threshold importance of determining the identity of the custodian.

Recent developments in the law of habeas corpus serve to confirm the holding in the instant case. *Rumsfeld v. Padilla,* 542 U.S. 426 (20004 [sic]), *Rasul v. Bush,* 542 U.S. 466 (2004), *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004), and *Hamdan v. Rumsfeld,* 126 S.Ct. 2749 (2006), reiterate that the remedy provided by the writ of habeas corpus is expansive and not confined solely to U.S. citizens. But the one constant in all these cases is that the petitioners were in the custody of the United States alone, in its capacity as the United States, and not by any multinational force. While the prisoners may have been *captured* by a multinational force, they were transferred to the sole custody of the United States, and it was that detention they challenged. There is not even the slightest hint in any of these cases that another nation or multinational entity claimed control over the prisoners.

This is not to say that the United States military may purposefully evade the habeas jurisdiction of the courts, or otherwise deprive citizens of their rights, merely by cloaking its conduct in the guise of a multinational force.[11]

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[11] Military personnel who participate in MNF-I remain subject to the military justice systems of their respective countries. United Nations Security Council Resolution 1546 (2004), which authorized MNF-I, incorporates by reference a letter from Colin Powell, then the Secretary of State for the United States, in which Powell represents that "the MNF under unified command" is prepared to participate in the maintenance of security in Iraq. Opp., Ex. 2 at 11. Powell's letter states that "the MNF must continue to function under a framework that affords the force and its personnel the status that they need to accomplish their mission, and in which the contributing states have responsibility for exercising jurisdiction over their personnel." *Id.* at 12. This language indicates that the participants in MNF-I retain court

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Nothing in today's holding is inconsistent with *Abu Ali v. Ashcroft*, 350 F.Supp. 2d 28 (D.D.C. 2004), which held that "the United States may not avoid the habeas jurisdiction of the federal courts by enlisting a foreign ally as an intermediary to detain the citizen." *Id.* at 41.

In *Abu Ali*, an American citizen was arrested and held in the Kingdom of Saudi Arabia by the Saudi government. But the citizen alleged, and "to some degree substantiated," that: (1) the United States initiated his arrest as part of an American criminal investigation; (2) the United States participated in interrogating him in the Saudi prison; (3) the United States controlled his detention in the Saudi prison; (4) the United States was keeping him in

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martial jurisdiction over their own personnel, rather than subjecting them to some sort of joint system of military justice. The letter cannot be read to suggest, as petitioner would have it, that the United States courts have subject matter jurisdiction over the habeas claims of prisoners who are guarded by U.S. forces operating within the framework of MNF-I. Taken as a whole and in context, Powell's letter clearly establishes that MNF-I is a distinct entity created to give the force "the status that they need to accomplish their mission," and that the letter simply reserves the military justice jurisdiction of each country "over their personnel."

Furthermore, while placing U.S. personnel under the unified command of a multinational force may result in the United States courts lacking jurisdiction over habeas corpus petitions by detainees held by the multinational force on foreign soil, this does not mean that American military personnel are completely removed from the control of the United States government when they are put under a multinational command. To the contrary, they remain under the direction of the Executive, subject to the oversight of Congress. *See* U.S. Const. Art. II § 2 (setting forth power of President as commander in chief of the armed forces and in foreign affairs, subject in appropriate cases to Senate approval); *id.* at Art. I § 8, cl. 11-16 (setting forth powers of Congress to declare war, "make rules concerning Captures on Land and Water," support and fund an army and navy, "make Rules for the Government and Regulation" of the armed forces, etc.).

Saudi Arabia to avoid constitutional scrutiny by American courts; and (5) Saudi Arabia would immediately release the citizen to United States officials upon a request by the United States government. *Id.* at 30-31. The United States did not offer any facts to rebut these allegations, which were substantiated by numerous affidavits and other documentary evidence "of varying degrees of competence and persuasiveness." *Id.* The court held that the citizen was entitled to limited jurisdictional discovery to determine whether he was being held in the actual or constructive custody of the United States. If the citizen could prove that he was being held "at the behest and ongoing direction of United States officials," he could invoke habeas jurisdiction. *Id.* at 67.

The court in *Abu Ali* noted that "[t]he instances where the United States is correctly deemed to be operating through a foreign ally as an intermediary for purposes of habeas jurisdiction will be exceptional, and a federal court's inquiry in such cases will be substantially circumscribed by the separation of powers." *Id.* at 41. Because the United States Executive was acting under its foreign affairs powers in *Abu Ali,* principles of separation of powers and international comity "place[d] considerable limitations on the inquiry (and authority) of a United States court in this setting." *Id.* at 49. The importance of recognizing the "considerable limitations" on a court's "substantially circumscribed" inquiry is especially apparent in this case, where the Executive acts not only under its foreign affairs powers, by dealing with dozens of allies and the United Nations, but also under its war powers.

Applying that "substantially circumscribed" inquiry to this case, it is clear that the United States is not "operating through" MNF-I "as an intermediary." In *Abu Ali* the

petitioner presented, and the United States did not attempt to rebut, substantial evidence that the petitioner was arrested and held by officials of the Kingdom of Saudi Arabia at the request of the United States, that America controlled his ultimate disposition, and that his immediate custodians had no independent interest in detaining him. In this case, petitioner offers little real evidence that the United States is using MNF-I as an "intermediary to detain the citizen." The habeas petition alleges that petitioner is "in U.S. custody," and does not allege that the United States is acting through some intermediary. In their briefs, petitioner's counsel merely handpick quotations from U.S. military leaders to imply that the United States has control over MNF-I. *See* Reply Memorandum in Support of Petitioners' Application for a Temporary Restraining Order [10-1] at 5-6 n.2.

Petitioner also submitted supplemental information regarding his hearing and sentencing before the Iraqi Trial Panel. *See generally* Second Riordan Decl. Therein, petitioner apparently attempts to allege that U.S. military personnel interfered with the Iraqi proceeding. This statement, which is disputed by respondents at every point, and which does not point to any evidence that the Americans were acting outside of their roles in MNF-I, falls far short of the kind of allegations that were required in *Abu Ali* to obtain jurisdictional discovery, let alone to establish jurisdiction. To the extent petitioner claims that the Americans interfered with the fairness of his trial, his remedies lie in the Iraqi courts. Petitioner has not alleged the kind of jurisdictional facts that would qualify this case as one of the "exceptional" instances where the United

States is acting through an intermediary to detain a citizen.[12] Given the paucity of allegations that petitioner is in the custody of the United States and not MNF-I, and the necessarily "substantially circumscribed" nature of the Court's inquiry, jurisdictional discovery is not warranted.

Finally, *Eisentrager* and *Rasul* strongly suggest that there are constitutional aspects to the right to habeas

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[12] This puts the Court at odds with the ruling in *Omar v. Harvey*, 416 F.Supp. 2d 19 (D.D.C. Feb. 13, 2006), whereby Judge Urbina issued injunctive relief to bar the transfer of an American citizen from MNF-I to Iraqi authorities. Judge Urbina held that the citizen, Omar, had pled sufficient jurisdictional facts to warrant injunctive relief. The "strong evidence that [Omar] is in the custody of the United States military" consisted of two e-mails from State Department employees to Omar's wife, saying that he was "under U.S. military care, custody and control" and that he was "under control of Coalition Forces (U.S. and MNF)." *Id.* at 25. The Court respectfully disagrees that the casual representations of a State Department employee provide a sufficient basis for what amounts to piercing the veil between the United States and an entity comprised of the United States acting jointly with its allies. For instance, in this case petitioner Munaf's sister claims that a State Department employee "confirmed that Mohammad [Munaf] was in U.S. custody" in a telephone conversation. Mohammed Decl. 14. By the logic of *Omar*, this statement would be allowed to trump the determination by the United States and its allies and the United Nations that the allied forces shall act jointly through the distinct entity of MNF-I. The government has been careless in its language, which sometimes reflects the reality that it is mostly U.S. troops who are carrying out the mission of MNF-I, and thus it is usually U.S. troops who are doing the physical "holding" of the petitioner. But it takes more than some offhand remarks by a few government officials to change the nature of a multinational force that has been created by the governments of over two dozen sovereign nations. Much more is required to establish habeas jurisdiction in the face of Supreme Court precedent respecting the distinction between the United States when it acts alone and when it acts as part of an allied force, as well as the "substantially circumscribed" nature of the Court's inquiry under *Abu Ali*.

corpus, whether or not they are embodied in the jurisdictional statute. To the extent that there remain constitutional aspects of the right which have not been covered by recent Supreme Court decisions, this does not change the outcome of this case. The right to habeas corpus embodied in the statute reflects the fundamental nature of the writ as captured in the Constitution and as it has survived for centuries in the common law. It is a right against the sovereign.

Courts have struggled to describe the scope of the right by reference to territorial bounds, citizenship, and the malleable meaning of custody itself. *See, e.g., Rasul,* 542 U.S. 466, nn.11-14 and accompanying text (collecting authorities on the territorial ambit of the writ at common law); *Ex parte Mwenya,* [1960] 1 Q.B. 241 (same); 1 Op. Atty Gen. 47 (1794) (Attorney General William Bradford opining that the writ extends to areas or entities within the sovereign control of the government). But at least one thing is constant about the right: it applies only against the sovereign that grants it. The petitioner here is challenging his detention on foreign soil, under the authority of a multinational force, at the request of a foreign government. "[P]rovisions of the Federal Constitution relating to the writ of habeas corpus, bills of attainder, ex post facto laws" and the like "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country," because there the citizen is treating with a foreign country, and our Constitution gives him rights only as against the United States. *Neely v. Henkel,* 180 U.S. 109 (1901). The same holds true of a duly constituted allied force, against which petitioner does not have constitutional rights. Whatever independent effect the habeas provision of the Constitution may have,

it does not grant petitioner the right to secure the writ against one who does not hold him in custody "under or by color of the authority of the United States" or "in violation of the Constitution or laws or treaties of the United States." The habeas provision of the Constitution therefore cannot expand the jurisdiction of the Court in this case beyond that granted by the statute.

In cases such as *Hirota,* the Supreme Court recognized that when the United States commits troops to a multinational, allied force, that force is a unique juristic entity distinct from the United States. The distinction between unilateral American action and multinational, allied action is no mere nicety or matter of form. It is a real distinction with real, substantive consequences. This distinction was summarized by Justice Jackson, in a separate memorandum, when he described his reluctance to vote for review of the claims in *Hirota:*

> On American initiative, under direction of the President as Commander-in-Chief, this country invited our Pacific allies, on foreign soil, to cooperate in conducting a grand inquest into the alleged crimes, including the war guilt, of these defendants. Whatever its real legal nature, it bears the outward appearance of an international enterprise, undertaken on our part under the war powers and control of foreign affairs vested in the Executive. For this Court now to call up these cases for judicial review under exclusively American law can only be regarded as a warning to our associates in the trials that no commitment of the President or of the military authorities, even in such matters as these, has finality or validity under our form of government until it has the approval of this Court. And since the Court's approval or disapproval cannot be

> known until after the event – usually long after – it would substantially handicap our country in asking other nations to rely upon the word or act of the President in affairs which only he is competent to conduct.

Hirota v. MacArthur, 335 U.S. 876, 878 (Jackson, J.) (Memorandum).[13] The United States has placed troops in Iraq under the unified command of a multinational force. It has not thereby placed that force and all its troops, whatever flag they may fly, under the strictures of the Constitution and the reach of this Court. There is evidence that this force is a true coalition over which no single nation has sovereignty, and petitioner has not demonstrated that it is a mere sham by which the United States seeks to avoid constitutional accountability. Petitioner is in a foreign country and in the custody of MNF-I, not the

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[13] Justice Jackson did not participate in the decision in *Hirota*, because of his involvement in the Nuremberg war crimes tribunal in Europe. He explained that his decision to break the tie and allow argument in *Hirota* stemmed from a desire to put to rest criticisms of the tribunal by America's enemies, and he did not express an opinion on the Court's jurisdiction. *Hirota v. MacArthur*, 335 U.S. 876 (1948) (Jackson, J.) (Memorandum). While petitioner in this case attempts to treat the Court's ruling in *Hirota* as an isolated case, it is worth noting that a divided Supreme Court declined to review numerous habeas petitions implicating dozens of petitioners in Germany following WWII, though four members of the Court wanted to hear argument on the jurisdictional issues raised by the petitions. Justice Jackson, who recused himself from the cases involving German petitioners, intervened to break the tie and secure review in *Hirota*. The precedential value of *Hirota* should thus be considered in light of the robust debate that centered around the issues at the time. *See generally* Charles Fairman, "*Some New Problems of the Constitution Following the Flag*," 1 STAN. L. REV. 587 (1949) (discussing post-WWII habeas petitions by German and Japanese prisoners).

United States, and he is therefore beyond the habeas corpus jurisdiction of this Court."

III. CONCLUSION

The Court is aware of the debate over the right of aliens to obtain the writ of habeas corpus, even when they are not held in the United States, and so it is aware that some will consider today's decision anomalous. But no court in our country's history, other than *Omar*, has ever found habeas corpus jurisdiction over a multinational force comprised of the United States acting jointly with its allies overseas. And the law is legend that in time of actual hostilities or war, as in Iraq, courts should tread lightly and give the President, as Commander-in-Chief, the full power of his office. The President has the power to "employ [the Nation's Armed Forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy," *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850), and such decisions are "delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people

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" Petitioner also attempts to invoke jurisdiction under 28 U.S.C. §§ 1331, 1651, 2201, and 2202, Article I, § 9, cl. 2 and Article III of the Constitution, and the Due Process Clause of the Fifth Amendment. None of these provisions provide a proper basis for jurisdiction. Because the petitioner is in the custody of MNF-I, against whom no U.S. law secures him rights, he cannot point to a constitutional provision, law, or treaty of the United States that his case arises under, and thus he cannot invoke federal question jurisdiction. His invocation of the All Writs Act and Declaratory Judgment Act is unavailing because those remedial statutes presume jurisdiction and do not create it. Likewise, the constitutional provisions he cites do not independently create jurisdiction for him, nor for that matter do they secure any rights for him against his custodian, MNF-I.

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